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IN THE

SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1993

ANA M. OLIVAREZ, WARDEN OF THE
DEUEL VOCATIONAL INSTITUTION
OF THE STATE OF CALIFORNIA,

Petitioner,

v.

MICHAEL SHERIDAN MCKINNEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT
(AFTER GRANT OF CERTIORARI AND REMAND)

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON, Chief
Assistant Attorney General
CAROL WENDELIN POLLACK, Senior
Assistant Attorney General
KEITH H. BORJON, Supervising
Deputy Attorney General
ROBERT S. HENRY*
Deputy Attorney General
300 S. Spring Street, 5th Fl. N
Los Angeles, California, 90013
Telephone: (213) 897-2257
ATTORNEYS FOR PETITIONER
*Counsel of Record

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QUESTIONS PRESENTED

1. Whether the introduction of character evidence to show propensity in a closely-balanced case constitutes *per se* a violation of Due Process and, if so,

2. Is the application of such a rule contrary to *Teague v. Lane*, 489 U.S. 288 (1989) as applying a "new rule" for the first time on collateral review?

3. If a state appellate court has found that permissible inferences were raised by certain evidence and that the evidence was probative of issues in dispute, are such findings binding under *Sumner v. Mata*, 449 U.S. 539 (1981), as facts which the collateral reviewing court must treat deferentially or are such findings legal conclusions which the collateral reviewing court can completely ignore?

4. Separately, does the failure by the collateral reviewing court to recognize the permissible inferences found by the state appellate court violate this Court's holding in Estelle v. McGuire, 502 U.S. ___, 112 S. Ct. 475, 116 L.Ed.2d 385 (1991) by ignoring the permissible inferences to be drawn from the introduction of the evidence, rather than, as in Estelle, finding that the permissible inferences do not relate to a matter in dispute.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, filed April 28, 1993 as amended on June 10, 1993, in No. 89-55869 (993 F.2d 1378 (9th Cir. 1993)), is attached hereto as Appendix A.

On September 10, 1993, the Court of Appeals issued an order denying the

petition for rehearing and rejecting the suggestion for rehearing *en banc* which is attached hereto as Appendix B.

On January 13, 1992, this Honorable Court issued a decision (see Gomez v. McKinney, 112 S. Ct. 859, 116 L. Ed. 2d 767 (1992)) granting certiorari, vacating the previous opinion and remanding this case to the Ninth Circuit for further consideration in light of Estelle v. McGuire, 502 U.S. ___, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). A copy of this decision is attached as Appendix C.

On September 5, 1990, the United States Court of Appeals for the Ninth Circuit issued its original opinion in this case, a memorandum decision not for publication, a copy of which is attached as Appendix D. Petitioner's petition for rehearing of that decision and suggestion for rehearing en banc was denied in an

order attached hereto as Appendix E.

On June 19, 1989, a United States Magistrate-Judge issued a "Report and Recommendation of United States Magistrate on a Petition for Writ of Habeas Corpus by a Person in State Custody." On July 27, 1989, the United States District Court for the Central District of California issued an "Order Adopting Findings, Conclusions, and Recommendations of United States Magistrate." On July 31, 1989, a "Judgment", which granted the writ of habeas corpus, was issued in favor of respondent. These orders are attached hereto collectively as Appendix F.

On February 19, 1988, a United States Magistrate issued an "Order" holding that respondent had exhausted his state remedies and ordering petitioner to file a return on the merits to the petition for writ of habeas corpus which

is attached hereto as Appendix G.

On September 24, 1986, the California Supreme Court issued an order denying respondent's petition for writ of habeas corpus which is attached hereto as Appendix H.

On July 24, 1986, the California District Court of Appeal for the Second Appellate District, Division One, issued an opinion affirming the conviction which is attached as Appendix I.

JURISDICTION

The date of the judgment which petitioner seeks to have reviewed is June 10, 1993, amending a decision issued on April 28, 1993. See Appendix A.

A petition for rehearing was denied on September 10, 1993. A suggestion for rehearing *en banc* was also rejected on September 10, 1990. See Appendix B.

The jurisdiction of this Court is

invoked pursuant to Title 28, United States Code, section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(a):

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On December 19, 1984, respondent, who brutally slit his mother's throat, was convicted by jury in a state court in

California of murder in the first degree, a violation of California Penal Code section 187. The state jury also found true a special allegation that in the commission of the offense, respondent had personally used a knife, which use was not necessarily an element of the offense, within the meaning of California Penal Code section 12022(b). Respondent was sentenced to state prison for the term prescribed by law, 25 years to life, for the offense of murder and was sentenced to serve one year for the special knife use allegation found true. Clerk's Transcript, p. 158[1]/.

Respondent appealed his conviction to the California Court of Appeal,

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1. Copies of the Clerk's Transcripts and the Reporter's Transcripts of the trial were lodged below as Docket Number 10 and are hereinafter referred to, respectively, as "CT" and "RT."

contending, *inter alia*, that the trial court had allowed overly prejudicial evidence, to wit, prior ownership of, and fascination with, knives. On July 24, 1986, respondent's conviction was affirmed by the California Court of Appeal, Second Appellate District, in an unpublished decision. Appendix I.

Respondent attempted to obtain direct review of the decision of the California Court of Appeal by filing, in the California Supreme Court, an untimely Petition for Review which was rejected for filing. Respondent then filed a Petition for Writ of Habeas Corpus in the California Supreme Court. This petition was denied without comment or citation to authority. Appendix H.

Respondent then filed the instant petition for writ of habeas corpus in the United States District Court for the

Central District of California in which he alleged, *inter alia*, that his due process rights had been violated based on his allegation that overly prejudicial evidence, to wit, knife ownership and fascination, had been admitted at his state trial.

Petitioner then filed a return on the merits. Docket No. 9. The United States Magistrate-Judge subsequently issued a "Report and Recommendation of United States Magistrate on a Petition for Writ of Habeas Corpus by a Person in State Custody" which found that the prejudicial character of the knife ownership and fascination evidence outweighed its probative value and that the "error" in the admission of the evidence had a likely effect on the outcome of the trial and, thus, respondent's due process rights were violated and the writ should be granted.

Appendix G. Judgment granting the writ of habeas corpus was issued in favor of respondent on July 31, 1989. Appendix G.

On August 10, 1989, petitioner filed a "Notice of Appeal" of the judgment of the United States District Court. Docket No. 30. On November 20, 1989, petitioner filed an appellant's brief in the Court of Appeals for the Ninth Circuit. On September 5, 1990, the United States Court of Appeals for the Ninth Circuit, in No. 89-55869, issued a memorandum decision affirming the judgment of the United States District Court and found respondent's trial to be fundamentally unfair in violation of his constitutional right to due process. See Appendix D.

On September 11, 1990, petitioner filed a petition for rehearing and suggestion for rehearing *en banc*. The petition for rehearing and suggestion for

rehearing *en banc* was denied on November 30, 1990. See Appendix E.

On or about January 29, 1991, petitioner filed, in this Court, a "Petition for Writ of Certiorari." On January 13, 1992, this Court granted the petition for writ of certiorari and remanded this case back to the Ninth Circuit Court of Appeals in light of Estelle v. McGuire, 502 U.S. ___, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). A copy of this decision is attached as Appendix C.

On April 28, 1993, the Ninth Circuit Court of Appeals issued a decision again affirming the judgment of the United States District Court granting the writ. On June 10, 1993, the Ninth Circuit Court of Appeals issued an Order amending the opinion. See Appendix A.

On September 10, 1993, the Ninth

Circuit Court of Appeals denied petitioner's "Petition for Rehearing and Suggestion for Rehearing *En Banc.*" See Appendix B.

STATEMENT OF FACTS

On January 28, 1984, at 11:30 p.m., respondent's adoptive mother was found dying at home from four cuts to her body, one slash to the throat and three chest wounds. The state court jury rendered a special finding of fact that respondent had personally used a knife in the commission of murder and enhanced respondent's sentence by reason thereof. C.T. 158.

Respondent testified that, on the night of the murder, he had left the house for the movies earlier in the night and had come home at 11:00 p.m., dozed off, and found his adoptive father holding his mother at 11:30 p.m. Respondent's

adoptive father, Quentin McKinney, a long distance trucker had just returned from a trip on the night of the murder, and he testified that after an argument between respondent and his wife, he had gone to sleep at 8:30 p.m. and had awakened at 11:30 p.m. to find his wife dying of the wounds. R.T. 83.

A pair of ski gloves, which respondent denied were his but which one of his female associates from Canada stated were similar to gloves she had seen him wear, were found to bear the victim's blood. R.T. 903. In addition, a pair of camouflaged pants belonging to respondent were soaked with the victim's blood. R.T. 217-218. The tee-shirt worn by Quentin McKinney when he held his wife also contained the victim's blood. However, a Buck knife Mr. Quentin McKinney was wearing was taken by the police, examined,

and found to contain no blood whatsoever, despite the fact that he had been holding his bleeding wife and wearing the knife for a considerable amount of time. R.T. 192-193, 347, 349.

The residence was a secured dwelling and there were no signs of forced entry. R.T. 190. The argument between respondent and the victim concerned respondent's attempt to borrow $3,000 from the father to continue school and the victim's opposition to that request. The father had stated that he would go to sleep and decide whether to make the loan after he awoke. R.T. 64-67.

The murder weapon was never recovered, but the Coroner testified that two weapons presented to him for display could have inflicted all four wounds. R.T. 496, 497. One weapon presented to the Coroner, which was purchased by the

prosecution, was a replica of a Gerber dagger once owned by petitioner and confiscated in September by the police. The second weapon was a Tekna dagger that was surrendered to the prosecutor by respondent's best friend, Constantine Potamianos, after the murder. Potamianos told the prosecutor, however, that respondent had made a gift to him of the dagger three months prior to the murder. R.T. 414, 416.

REASONS FOR ALLOWANCE OF THE WRIT

Petitioner urges that a writ of certiorari should be granted for the following special and important reasons:

A. The decision of the Court of Appeals for the Ninth Circuit "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this

Court's power of supervision" (United States Supreme Court Rules, Rule 10.1.(a)) in that:

1. The decision (a) wrongfully extends federal habeas corpus jurisdiction into state court trials by holding that in a closely-balanced case, the introduction of character evidence solely to show propensity constitutes "Due Process error" and thus, (b) creates a "new rule," applied for the first time on this collateral review in violation of Teaque v. Lane, 489 U.S. 288 (1989); and,

2. The decision violates this Court's decisions in Estelle v. McGuire, supra, and

Sumner v. Mata, supra, by completely ignoring "inferences" that the state appellate court found could be drawn from the evidence and substituting its own opinion as to whether the "inferences" the state appellate court found could have actually been drawn at all.

ARGUMENT

I

CHARACTER EVIDENCE2/ SHOULD NOT BE DEEMED TO BE INTRINSICALLY VIOLATIVE OF THE FEDERAL CONSTITUTION

The Ninth Circuit decision here has undertaken what is perhaps the boldest step in American Jurisprudence in the last few decades. Traditionally, the United States Supreme Court has jealously guarded the rights of the States to conduct their own criminal trials without undue interference by the federal government. Donnelly v. De Christoforo, 416 U.S. 637, 642 (1974).

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2. Petitioner wishes to make clear at the outset that it strongly disagrees that the evidence introduced in the trial court below was either "character" evidence or that it was introduced "to show propensity." In fact, as urged by Petitioner to no avail in many prior pleadings before the Ninth Circuit, the evidence in question was habit, custom,

Striking at the heart of that protection, the Ninth Circuit has now decided that there are "rule-like" federal constitutional limitations to the introduction of ordinary evidence in state criminal trials, even when that evidence does not violate any specific constitutional guarantee or is not itself so patently offensive as to violate due process. Specifically, the Ninth Circuit has zeroed in on "character evidence" and has, by this decision, created a "rule" that it is federal constitutional "error," in a closely-balanced case, for a state criminal trial to allow introduction of character evidence that is not probative of any issue (or does

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2. (cont.) and prior acts evidence introduced to overcome a matter sought to be proved by the defense and to indicate a consciousness of guilt on the part of the defendant. However, this petition

not raise a permissible inference); and, further, that if federal habeas corpus reviewing courts are confronted with the existence of such evidence, their next step should be to determine if this "error" is harmless.

This Court has on many occasions declined to confront the question of whether the introduction of ordinary evidence in a state court trial can be intrinsically violative of due process. Two notable examples are Spencer v. Texas, 385 U.S. 554 (1966), wherein this Court makes clear that the Federal Constitution is not "infringed if a jury is told of a defendant's prior crimes."

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2. (cont.) proceeds on the basis that even if the trial court admitted character evidence to show propensity, there was committed no federal constitutional error and that the defendant was not thereby deprived of a fundamentally fair trial.

There, this Court noted that the rules of evidence concerning prior offenses are "complex, and vary from jurisdiction to jurisdiction..." Id. at p. 560. This Court stated, however, that, "To say the United States Constitution is infringed simply because this type of evidence may be prejudicial and limiting instructions inadequate to vitiate prejudicial effects, would make inroads into this entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence." Id. at p. 562.

Spencer, supra, then noted that even in a federal prosecution, where the Government was permitted to cross-examine defense witnesses as to defendant's character and prior conviction (Michelson v. United States, 335 U.S. 469 [69 S.Ct. 213; 93 L.Ed.2d 168] (1948)), it "was not

the best forum for developing [federal] rules of evidence, and would, therefore, not proscribe the long-standing practice at issue." Id. at pp. 562-563.

Quite logically, the Spencer Court itself then reasoned, "A fortiori, this reasoning applies in the cases before us today which arise not under what has been termed the supervisory power of this Court over proceedings in the lower federal courts . . . but in the form of a constitutional claim that would require us to fashion rules of procedure and evidence in state courts. It is noteworthy that nowhere in Michelson did the Court or dissenting opinions approach the issue in constitutional terms." Id. at p. 563; emphasis in original.

The Spencer Court next discussed the issue from the standpoint of fundamental due process and rejected the notion that

the Due Process Clause of the Fourteenth Amendment required the exclusion of prior conviction evidence. The Spencer Court noted that the admission of such evidence may not be the best way to accomplish the fact finding necessary for the application of the recidivist statutes under review there, "But it has never been thought that such cases establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority." Id. at pp. 563-564.

The second notable instance is Estelle v. McGuire, supra, wherein this Court, noting Spencer, declined to decide whether the introduction of evidence could intrinsically be said to constitute a due process violation. See Estelle, supra, 502 U.S. ___, 112 S.Ct. 475 at p. 481.

It appears, however, that now the Ninth Circuit has forced this Court's hand. Until now, the delineations between state criminal court trials, federal criminal trials and the federal writ of habeas corpus have been clear. The federal statutory, case law, and constitutional provisions control the receipt of evidence in federal court trials. The state statutory, case law, and state and federal constitutional provisions control the receipt of evidence in state court trials.

Additionally, the propriety of the receipt of evidence in state court trials has been traditionally evaluated on habeas corpus review according to a federal constitutional analysis in two manners. First, state court evidence can violate a specific constitutional guarantee of the defendant such as exclusionary rule

evidence (Mapp v. Ohio, 367 U.S. 643 (1961)); evidence in violation of the privilege against self-incrimination (Miranda v. Arizona, 384 U.S. 436 (1966)); evidence focusing on the defendant's exercise of his constitutional right to remain silent during custodial interrogation (Doyle v. Ohio, 462 U.S. 610 (1976)) or his right not to testify (Griffin v. California, 380 U.S. 609 (1965)); and certain evidence, such as hearsay, which might infringe on the defendant's right of confrontation of witnesses (Chambers v. Mississippi, 410 U.S. 284 (1973)) or might derogate, in some manner, his right to assistance of counsel (Massiah v. United States, 377 U.S. 201 (1964)). Though not exhaustive, the foregoing are examples of where the admission of evidence in a state court criminal trial might run afoul of specific

guarantees provided a defendant by the Constitution.

The second way in which the introduction of evidence might violate the federal constitution is that the evidence might rise to a level in which it denies the defendant a "fundamentally fair" trial guaranteed by the Fifth and Sixth Amendments and made applicable to the States through the Fourteenth Amendment. For example, there can be no question that a trial court could not issue an evidentiary ruling that prevented the defendant from offering <u>any</u> evidence in his own behalf. Although this action would not violate any specific constitutional guarantee, it would deny him a fair trial as a whole.

Often overlooked, as is done by the Ninth Circuit here however, is the fact that this Due Process guarantee as to the

conduct of the trial is not a common law rule-type specific provision in which the inquiry focuses on the evidence itself but is a much broader protection in which the inquiry focuses on the fairness of the trial as a whole. In other words, under Due Process, the defendant is only guaranteed that he receive a fair trial and not that any specific class of evidence will or will not be admitted against him. Only when the introduction of that evidence rises to the level of depriving him of a fair trial as a whole does the Constitutional bar assert itself.

Moreover, this Due Process bar cannot, like a statutory scheme, be confined, or even definable, by reference to a class or species of evidence such as "character evidence." Accordingly, the Due Process bar to the admission of evidence as guaranteed by the Constitution

is not part of an unstated "Federal Constitutional Evidence Code." Rather, it is a guarantee to each citizen that he will receive a fundamentally fair trial without the introduction, or exclusion for that matter, of evidence that destroys that right.

The point made above can more clearly be illuminated by reviewing the decision of the Ninth Circuit with respect to "character evidence." The decision first points out that character evidence offends not only the "California Rules of Evidence" and the "Federal Rules of Evidence," but "is contrary to firmly established principles of Anglo-American jurisprudence." See Appendix A, pp. 83-85. However, what the Ninth Circuit itself fails to note while it is so stating is that neither the "California Rules of Evidence," the "Federal Rules of

Evidence," nor the "firmly established principles of Anglo-American jurisprudence" are of federal constitutional dimension and cannot be relied on to grant relief under 28 U.S.C. § 2254. Estelle v. McGuire, supra, 112 S.Ct. 475 at p. 480 (1992).

Further, the decision proudly relies on the fact that, "The rule against using character evidence to show behavior in conformance therewith, or propensity, is one such historically grounded rule of evidence. It has persisted since at least 1684 to the present, and is now established not only in the California and federal evidence rules, but in the evidence rules of thirty-seven other states and in the common-law precedents of the remaining twelve states and the District of Columbia." See Appendix A, pp. 85-86.

Again, the enactment of all of these laws were at the instance of a legislative or judicial body making value determinations as to the conduct of the procedural aspect of trials within their own political subdivisions. As observed by the Spencer Court, in the quote above, the federal constitution does not imbue federal habeas corpus reviewing courts with such rule-making powers nor does the decision cite any authority granting them such powers.

Nor would such a grant of authority be precedented or wise. As stated above, the Due Process bar to the introduction of evidence is one which focuses on the "fundamental fairness" of the trial, with emphasis on the word "fundamental." Consistent with the latter notion, the Due Process bar to the introduction of evidence in a state court criminal trial

is not, nor can it be, applicable to evidence whose "fairness" can be the subject of reasonable debate.

For example, if a person has committed a particular crime, such as drunk driving, twenty-five times previously, some would say that his history might be probative of whether he was guilty of driving drunk on the charged occasion. However, others might, for policy reasons, want to exclude that evidence as being likely to be given undue weight by the jury. However, this is merely a policy determination and not a constitutional rule, which is why the prohibition against the use of character evidence is codified by the States enumerated in the decision and enshrined in the common law of the other States, yet it has not been enacted, or interpreted, as an independent provision of the Federal

Constitution. The simple fact is that the Ninth Circuit has now done so by judicial fiat.

The manner in which the Ninth Circuit does so is oblique and not direct. However, its central holding is clearly ascertainable by reference to fragments of rulings that appear throughout the decision. First, it states, "[In Estelle] [t]he Court did not address the questions of whether admission of irrelevant evidence could violate due process guaranteed by the Fourteenth Amendment (id.), or whether the use of character evidence to show propensity would violate due process." See Appendix A, p. 69.

Later, the Ninth Circuit unabashedly announced that, "Thus, we address the question left unanswered in Estelle: When does the use of character evidence to show propensity constitute a violation of the

Due Process Clause?" See Appendix A, p. 99.

The Ninth Circuit shortly thereafter gave its answer by stating, "The character rule is based on such a 'fundamental conception of justice' and the 'community's sense of fair play and decency' as concerned the Supreme Court in Dowling." Interestingly, next, the Ninth Circuit included the curious language that, "In this situation, McKinney's trial was impermissibly tainted by irrelevant evidence such that it is more than reasonably likely that the jury did not follow its instructions to weigh all the evidence carefully, but instead skipped careful analysis of the logical inferences raised by the circumstantial evidence and convicted McKinney on the basis of his suspicious character and previous acts, in violation of our community's standards of

fair play. ¶ The analysis that leads us to conclude that the erroneous admission of propensity evidence rendered McKinney's trial fundamentally unfair in violation of the Due Process Clause is similar to the analysis we must undertake to determine whether his conviction must be set aside on collateral review." See Appendix A, pp. 103-104.

The decision thereafter engages in a "harmless error" analysis under Brecht v. Abrahamson, ___ U.S. ___, 113 S.Ct. 1710, 1713 (1993). Appendix A, pp. 104-109. However, one might question how there can ever be a "harmless fundamentally unfair trial" in much the manner petitioner has been questioning how the Ninth Circuit could deem this to be a "closely-balanced fundamentally unfair trial."

The rule the Ninth Circuit has

applied herein is that character evidence to show propensity violates the "concepts of fair play" per se and if introduced in a case wherein the evidence is closely-balanced constitutes Due Process "error." However, as stated above, the holding must be gleaned from several pages of the opinion and is not enunciated on one page alone.

Nonetheless, the ingenious device employed by the last portion of the decision quoted above saddles the State with the commission of error based on a harmless error analysis prior to its engaging in the actual harmless error analysis. Under Brecht, the federal constitutional violation considered was the introduction of evidence of the defendant's post-Miranda silence, a violation of a specific constitutional guarantee. There was no question that

there was constitutional error. However, in initially finding constitutional error here in McKinney, the Ninth Circuit includes, as a component thereof, the fact that the case was closely-balanced.

However, as stated above, unlike the violation of a specific constitutional guarantee, the Due Process bar to the introduction of evidence in a state criminal trial is reserved for evidence that completely nullifies the defendant's right to a "fundamentally fair trial," not merely evidence that may, as all evidence of any value tends to do, tip the scales against him.

Due Process "error" with regard to the admission of ordinary evidence cannot be dependent upon the "closeness" of the case. Otherwise, federal habeas corpus reviewing courts would be given free rein to critically inspect state court criminal

trials for the introduction of evidence that the federal reviewing courts would not have, in their own conception of "fair play," allowed to have been admitted. They could then, as the Ninth Circuit has done here, simply rule that the admission of the evidence constituted a "Due Process violation" if the case were "closely-balanced." This would be wrong for the reason that the federal habeas reviewing courts would be making a "value" judgment, as the Ninth Circuit has done here, as to what evidence is or is not reliable and thus whether it should be allowed to be introduced. This is a legislative or rule-making type function, not a judicial one, and, a fortiori, not a proper judicial undertaking on collateral review.

Instead, the proper analysis is whether the introduction of the evidence nullified the defendant's right to a fair

trial. The reason that that ruling was not made here is because, quite obviously, it appears on its face that evidence of the defendant's propensity to involve himself with the type of weapon that committed the crime, while not conclusive of his guilt, certainly cannot be said to have nullified his right to a fair trial. Notwithstanding a federal habeas reviewing court's subjective opinion as to the reliability of the evidence admitted, the defendant cannot be said to have been deprived of a fair trial as long as the evidence in question bears rationally on his guilt. As argued above and demonstrated below, with respect to the question of sufficiency of the evidence, the question of reliability is not one for a federal court on collateral review.

Another reason why the Ninth Circuit employed this curious route to finding

"Due Process error" lies in the rule regarding the sufficiency of the evidence and an understanding of why the Ninth Circuit could not employ an insufficiency of evidence analysis. It must not be forgotten that another restraint on the introduction at a state court trial of evidence of dubious value remains the federal constitutional guarantee of conviction only upon sufficient evidence. Jackson v. Virginia, 443 U.S. 307 (1979).

It must be remembered that the central holding of Jackson, supra, was derived from In re Winship, 397 U.S. 358 (1970). In Jackson, supra, it was stated that "Under the Winship decision, it is clear that a state prisoner who alleges that the evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable

doubt has stated a federal constitutional claim. Thus . . . it follows that such a claim is cognizable in a federal habeas corpus proceeding." Jackson, supra, 443 U.S. at pp. 320-321; emphasis added.

Thus, if a state prisoner can show, on federal habeas corpus review, that his conviction lacks the substance to convince a rational trier of fact of his guilt beyond a reasonable doubt, he can receive redress of his conviction. It follows also that if either the defendant was convicted on character evidence alone, or, if excluding the character evidence, the conviction would not be substantial enough to allow a reasonable trier of fact to rationally conclude he was guilty, the same result would be occasioned.

Here, McKinney did not argue, on federal habeas corpus review, that the evidence was insufficient to support his

conviction. More importantly, neither did the Ninth Circuit interpret his claim, as to the introduction of the evidence, as an attack on the sufficiency of the evidence and afford him relief on that ground. The reason why is the same for both. It is simply because even excluding consideration of the evidence involving the knives, a rational jury could have convicted petitioner beyond a reasonable doubt based on the fact that his pants and his ski gloves were found soaked in his mother's blood, based on evidence of his mother's opposition, on the night of the murder, to his father's lending him money to continue his college education, and based on other evidence noted in the state appellate court opinion. See Appendix I.

The foregoing is important to the question of the Ninth Circuit's unwarranted extension of the Due Process

bar to the introduction of evidence in state court trials for two reasons. First, it simply shows that the Ninth Circuit had to create a "rule" allowing itself to grant the writ based on the admission of evidence, which, clearly, in the context of the trial itself, could not be said to have deprived the defendant of a fair trial in view of the fact that the remaining evidence was sufficient to convict him in any event.

Second, an understanding of the sufficiency of the evidence in this case under the Jackson standard highlights the question of whether this "due process" bar to the admission of evidence is a specific constitutional guarantee as to particular evidence or whether it focuses on the trial as a whole. The rule that ordinary evidence must, as a whole, be substantial enough to support a conviction by a

rational jury beyond a reasonable doubt alleviates the necessity for a rule constitutionally outlawing any particular class of evidence. In other words, if the evidence was such that it cannot be said that its exclusion would have worked a different result, where lies the offense to Due Process and why ought the federal constitution be concerned with it?

For the reasons stated above, respondent submits that a federal habeas corpus reviewing court, when considering the introduction of ordinary evidence at a state court criminal trial, cannot, as was done here, find "error" in the admission of the evidence based solely on the type of evidence considered or the effect of that evidence on the trial or even a combination of both. The court must make the judgment that the introduction of the evidence rendered the

trial as a whole "fundamentally unfair."

However, as can be easily seen by the various references to it in the decision, the concept of "fundamental fairness," as it relates to the standard for inquiry as to the existence of constitutional error, was paid at least perfunctory deference by the decision here. However, that phrase was easily subverted and reduced to a mere mantra chanted by the Ninth Circuit as a prerequisite to its reversing a murder conviction solely because it disagreed with the wisdom of admitting the evidence actually introduced at trial.

In this case, the state appellate court viewed all of the disputed evidence as an attempt by the prosecution to overcome the defense's assertion that respondent had simply given away his knives and had not replaced the one

confiscated by the police. See Appendix I. Obviously, if respondent was lying about not having his knife collection on the night of the murder, such lying pointed to his guilt and concealment of the murder weapon or weapons. The Ninth Circuit, however, viewed the same evidence as merely the prosecution's attempt to convict respondent based on his association with dangerous weapons such as knives.

However, no matter how the prosecution evidence is viewed, the decision, distilled, means simply that the Ninth Circuit has ruled the introduction of "knife evidence" as "fundamentally unfair" in a "knife killing" case where the murder "knife" was never recovered. This is stunning to all but the guilty, who, as one might expect, have always considered the introduction of evidence

bearing on their guilt to be "unfair."

Thus, the Ninth Circuit's definition of "fundamental fairness," as applied in this case, is inextricably tied to its own outlook on the "reliability" of the evidence. However, as stated above, it is not within the province of a collateral reviewing court to consider the "reliability" and thus the "admissibility" of the evidence. As such, the Ninth Circuit's definition of "fairness" is erroneous.

The question is, instead, whether the evidence is at all probative of the question of guilt or innocence. Obviously, a defendant's past association with the type of weapon that committed the offense is probative, whether or not reliable. If the evidence is probative, it follows it cannot be said to be fundamentally "unfair" and the question of

"reliability" must be left to bodies with "rule-making" authority, of which courts on collateral review have none.

However, even if evidence is not probative, it cannot be said, based on that fact alone, that a trial containing such evidence is "fundamentally unfair." The evidence could be innocuous. Moreover, petitioner's view, unlike that of the Ninth Circuit which in this decision fashions a rule that unreliable evidence that affects the verdict is "fundamentally unfair," is that the evidence must also vitiate the defendant's right to a fair trial.

This destruction of the right to a fair trial, however, cannot be ascertained merely by noting whether the evidence affected the verdict. Since 28 U.S.C. § 2254 did not create federal habeas corpus review to enact policy, particularly in

regards to the proper admissibility of evidence in reviewing state court criminal convictions, then the only pertinent question is not the effect of the evidence on the verdict but whether the introduction of the evidence has destroyed the defendant's right to a fair trial.

In this connection, "fundamental unfairness" would appear to mean that the evidence is of the type that is inconsistent with the defendant's right to a fair trial. Some courts have defined "fundamental unfairness" as being "inconsistent with the rudimentary demands of fair procedure." See Hill v. United States, 368 U.S. 424, 428 (1962); emphasis added.

In this sense of the word, rudimentary means basic or elementary. This difference must be given more than passing consideration because it explains,

in large part, the misconception of the Ninth Circuit here, and provides a focus into the reason that the "fundamental fairness" test must be refined by this Court.

Concentrating on the phrase "fairness" and equating it with "fundamental fairness" in toto, the Ninth Circuit simply reached the value judgment that the fact that respondent had been associated with knives in the past was no reliable indicator of whether he possessed a weapon on the night of the murder and/or whether he killed his mother and thus the introduction of that evidence was "unfair." Restrained only by such a loose definition of "fundamental fairness," a reviewing collateral court is free to indulge its own sense of what is "fair" in deciding whether error has been committed and will necessarily engage collateral

reviewing courts in the business of legislating "rules" of admission for state court criminal trials.

However, as stated above, the issue is not "fairness" but "basic fair play." A clarifying distinction between the two can best be made by example. Posit a complex business fraud prosecution wherein the State introduces evidence that the defendant on trial committed several acts of molestation against children in his neighborhood. As stated above, with the knife evidence, some may question the amount of its probative value on the question of guilt and debate as to the wisdom of its allowance. However, with respect to the molestation, it can easily be observed that not only does the evidence lack a logical relation to guilt or innocence of the fraud charge, but the introduction of the evidence, because of

the fact that it tends to engender a desire to punish the defendant for conduct of which he is not being charged, universally offends a "basic" sense of fair play.

On the other hand, the knife evidence, at worst, can only be said to tend to engender a suspicion as to guilt. However, the inquiry into guilt or innocence is the whole (and legitimate) purpose of the trial. As stated above, how that guilt or innocence is shown is the primary responsibility of the State, with the federal constitution intruding only to assure that the evidence is sufficient to allow conviction beyond a reasonable doubt by a rational jury. If the conviction does not meet that test, no reference is needed to the admissibility of the evidence.

Additionally, when "fundamental

unfairness" is instead viewed as, in part, referring solely to evidence likely to produce a conviction for reasons other than the guilt or innocence of the defendant on trial, it more closely aligns with the notion of "structural trial error" as opposed to "evidentiary error." This is proper because the federal constitution, which federal courts on collateral review utilize as a guideline, contains no "evidence code" or any legislative or "rule-making" authority.

Accordingly, respondent submits that a lack of "fundamental fairness" can only be occasioned by the introduction of evidence at a state criminal court trial where the evidence 1) has no logical relationship to the question of guilt or innocence and 2) creates a strong tendency to convict the defendant for reasons other than his guilt or innocence of the charges

upon which he was tried, and, 3) nullifies the defendant's right to a fair trial as shown by the fact that in the absence of the introduction of the evidence, no rational jury would have convicted him.

Lastly, passing mention should be made of "harmless error." Since it appears clear that logically there can be no "harmless fundamentally unfair trial," recognition of this fact again validates petitioner's conclusion that the "Due Process" guarantee of a "fundamentally fair trial" is "structural" and not a specific constitutional guarantee. Accordingly, it should be reserved for the gravest of violations equal, in import, to such violations as the denial of counsel or the casting of dice by the jury to determine the verdict.

Since, as stated above, the "fundamental fairness" doctrine has

devolved to a point where, as the Ninth Circuit has done here, a collateral reviewing court can rule debatable, and even probative, evidence as constitutionally barred, respondent prays this Court grant certiorari to refine this concept in order to protect the rights of the States to be the final arbiters of admissibility of ordinary evidence in their own trials.

II.

THE DECISION VIOLATES TEAGUE V. LANE

As stated above, the decision obliquely, though assuredly, creates a new rule that character evidence to show propensity that is reasonably likely to have been the basis of the conviction constitutes a violation of the Due Process Clause which must then be subjected to a harmless error analysis. Above respondent

has pointed to the fragments of the Ninth Circuit's decision which clearly shows the rule.

In addition, even a headnote to the decision clearly states, "[7] Because drawing propensity inferences from evidence of character was impermissible, the contested evidence here could have violated due process, since there were *no* permissible inferences which the jury could have drawn from it." See Appendix A, p. 70; underlining added, italics and bold in original.

In Teague v. Lane, supra, 489 U.S. 288, 109 S.Ct. 1060, 104 L.Ed.2d 206 (1989), this Court held that a new rule enunciated after the finality of a state criminal conviction cannot be applied for the first time on collateral review absent the existence of two narrow exceptions, i.e., rules which place certain conduct

beyond the power of the State to proscribe and rules which reflect procedures "implicit in the concept of ordered liberty." Id., at p. 311.

Here, by the stealthy nature of the Ninth Circuit's decision, it can be seen that the authors would not agree that the decision establishes a new rule at all. The decision attempts to cast its treatment of character evidence as being ensconced in law dating back to the Seventeenth Century. See Appendix A, p. 85. It also utilizes the concept of "fundamental fairness" which traditionally has been the test of whether the admission of evidence violates due process. See Appendix A, p. 83. Nonetheless, as argued above, the decision uses, or misuses, those traditional concepts in such a way as to fashion a new rule.

Obviously, the decision has not

sought to justify the application of the new rule it has enunciated on the basis of one of the two narrow exceptions since it does not acknowledge that it is creating a new rule. Nor does it appear that the decision could rely on either exception. The rule does not place certain conduct beyond the power of the State to proscribe and, given the discussion above, it can hardly be said that the introduction of the knife evidence shakes the foundations of any "concept of ordered liberty." As such, the decision violates the Teague doctrine and even if its analysis were correct and sound, which it is not, the judgment reached by the decision cannot stand and must be reversed.

III.

THE DECISION VIOLATES
ESTELLE V. MCGUIRE
AND SUMNER V. MATA

In Estelle v. McGuire, supra, this

Court reversed a decision of the Ninth Circuit because the Ninth Circuit, although it recognized the probative value of the evidence, had erroneously ruled the evidence not to be at issue. As if determined not to make that error again, here the Ninth Circuit has simply refused to recognize the probative value of the evidence.

Part of respondent's defense was that, in September, some four months prior to the murder and shortly after the police had confiscated his Gerber dagger, one of his favorite knives, respondent made a gift of his Tekna knife to Carlos Potamianos. The state appellate court found that permissible inferences refuting that claim could be derived from all of the evidence which the Ninth Circuit holds here was admitted in violation of the federal constitution and which respondent

urged should have been excluded.

The state appellate court found that introduction of evidence that respondent carved "Death is His" into his dormitory door as testified to by Christopher Roderick, respondent's dormmate, was permissible to impeach the testimony of Carlos Potamianos, respondent's friend, that he had been given the Tekna knife by respondent in September. See Appendix I, p. 200. With respect to the admission of the phrase itself, the state appellate court found the permissible inference that, "Quite arguably, the peculiar nature of the phrase caused the date and location of [respondent's] scratching on the closet door to be etched in Roderick's mind, thus proving that [respondent] was in possession of the probable murder weapon after Thanksgiving of 1983." See Appendix I, p. 201.

The decision of the Ninth Circuit here also criticizes, and even quotes in its text, questioning of respondent by the prosecutor as to whether respondent was fascinated with knives. See Appendix A, pp. 106-108. The Ninth Circuit decision chiefly relies on this evidence to prove its premise that the prosecutor was merely attempting to inflame the jury against respondent. However, the state appellate court found that the evidence concerning respondent's love for and association with knives was relevant to refute the testimony that he had lost interest in them after the confiscation of his Gerber dagger in September of 1983 before the murder of the victim the following January and that he had given his Tekna knife to Potamianos shortly after the Gerber dagger confiscation. See Appendix I, pp. 201-202.

The decision of the Ninth Circuit also found no permissible inference to be derived from the admission of evidence that respondent wore camouflaged pants with a knife strapped thereto on several occasions. However, the state appellate court found that appellant's habit of wearing the camouflaged pants with the Tekna knife "connected the wearer of those pants with the murder. Thus, the connection of [respondent's] previous possession of the Tekna knife with the camouflage pants was highly relevant." See Appendix I, p. 201.

Nonetheless, the Ninth Circuit decision here simply ignored those inferences drawn by the state appellate court. As to the bulk of the evidence, the Ninth Circuit simply issued an edict that it was "probative only of character and, thus, irrelevant . . .." See

Appendix A, p. 98. The Ninth Circuit zeroed in on the carving of the phrase "Death is His" only to suggest that it was "not logical" to infer that such a "peculiar and disturbing thing" written on the wall, would have lent credibility to Roderick's remembrance of the date. See Appendix A, p. 95.

In Estelle v. McGuire, supra, the Ninth Circuit had erroneously ruled that the permissible inference was present but not at issue. Here, the Ninth Circuit simply refuses to recognize the permissible inferences. Respondent submits, however, that the ruling of Estelle is broad enough that the decision herein conflicts with it and cannot be evaded by simply ignoring the inferences to be drawn or by simply decreeing that they do not exist.

Lastly, as shown above, the decision

does not defer to findings, and indeed does not even acknowledge the inferences made by the state appellate court. Under Sumner v. Mata, supra, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), a federal habeas reviewing court is bound to respect state appellate findings of fact under 28 U.S.C. § 2254 as if those findings were made by a state court jury. The decision recognizes this principle (Appendix A at p. 91) but argues that the determination of "relevance" is one of law. Respondent has no quarrel there. However, the existence of an "inference" is a factual determination derived from direct evidence. The rule in Sumner v. Mata applies to not only facts but also inferences drawn from those facts. See Matusiak v. Kelly, 786 F.2d 536, 543 (2nd Cir. 1986); Jarrett v. Headley, 805 F.2d 34, 42 (2nd Cir. 1986). As such,

respondent submits that the Ninth Circuit was bound by the state appellate court's judgment as to whether those inferences could be drawn, absent an analysis by the Ninth Circuit showing that those inferences were not "fairly supported" by the record. No such analysis was conducted in the decision and, in fact, the decision fails to make any mention of the fact that the state appellate court found that permissible inferences could be drawn indicating that the evidence was introduced to bear on matters at issue.

Respondent has found no other case precisely on point indicating that a federal habeas corpus reviewing court is bound to accept the judgment of a state appellate court as to the permissible inferences to be drawn from the introduction of evidence if fairly supported by the record. As such,

respondent prays that this Court grant certiorari to settle this question.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Petition for Writ of Certiorari should be granted.

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Respectfully Submitted,

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON, Chief
Assistant Attorney General
CAROL WENDELIN POLLACK, Senior
Assistant Attorney General
KEITH H. BORJON, Supervising
Deputy Attorney General

Robert S. Henry

ROBERT S. HENRY*,
Deputy Attorney General

ATTORNEYS FOR PETITIONER
*Counsel of Record